

SEC Releases Long-Awaited 'Plain English' Guidance for Digital Assets and Investment Contract Analysis

April 4, 2019

On April 3, the SEC Division of Corporation Finance released a No Action Letter and a suggested framework for applying the investment contract analysis to tokens and digital assets.

No Action Letter reaffirms 1958 guidance: streetcar and private jet tokens are not securities

The Division of Corporation Finance FinHub released a [No Action Letter](#) that reaffirms decades old guidance that prepaid coupons are not securities. While the facts of the letter submitted by TurnKey Jet, Inc. have updated the 1958 guidance provided by the Commission in *Release No. 33-3890 (January 21, 1958)* to 21st century facts involving blockchains and private jets, the principles remain the same: trading stamps redeemable for cash or merchandise, streetcar tokens redeemable for a ride, Christmas gift certificates, box tops and meal tickets are not securities and were not intended to be included within the scope of the securities law statutes. While TurnKey Jet has a modern twist on a streetcar token by virtue of tracking the tokens via a blockchain rather than a physical token to be dropped into a machine, and the streetcar is now a private jet that can transport you across the eastern seaboard, the basic structure of a non-transferable, single use token redeemable for a singular purpose is the same. And now, despite the introduction of a blockchain for TurnKey Jet's users and carriers to facilitate ease of payment and lower transactions costs in connection with buying private jet flights via a prefunded escrow account, the conclusion is also the same. A non-transferable, pre-paid coupon, redeemable for cash, a specific service or merchandise only, is not a security. The no action request, originally submitted to the Staff on behalf of TurnKey Jet in May 2018, provided a detailed analysis applying the investment contract factors set forth in *Howey* to TurnKey Jet's proposed tokens; however, given the clear factual analogy and similarity to the Commission's 1958 guidance, the ultimate position reached by the Staff is hardly surprising.

Corp Fin staff expands Director Hinman's guidance, publishes "framework" for investment contract analysis

The application of the SEC's historical guidance to a single use, non-transferable, dollar backed digital token has limited application across the broader implementations of blockchain technologies, particularly with respect to decentralized systems utilizing publicly available open source software. To address the more common implementations and applications of blockchain, tokens and cryptocurrencies, Division of Corporation Finance Staff [announced the release](#) of a "[Framework for 'Investment Contract' Analysis of Digital Assets](#)" which appears to expand upon the factors, originally laid out in Director Hinman's [June 2018 speech](#), that may help inform an issuer's *Howey* analysis. The factors, which the release prominently notes are the views of the Staff and are not a rule, regulation, or statement of the Commission, are more numerous and more detailed than those provided in June. The Framework also identifies factors relevant to projects that have already launched a blockchain project or application and distributed a token. The Staff warns that such projects must evaluate whether the token should be subject to the application of the federal securities laws – in each case requiring the promoter or active participant to make nuanced determinations regarding the relative functionality of the network, the relative liquidity of the token, the nature of the active participant's ongoing role with respect to the

network, whether or not the other 30+ factors cited by the Staff have been adequately addressed and how those factors should be weighted.

We will provide further analysis of the Framework, and its practical implications, in an upcoming alert.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

Alfred Browne Boston	abrowne@cooley.com +1 617 937 2310
Luke Cadigan Boston	lcadigan@cooley.com +1 617 937 2480
Patrick Gibbs Palo Alto	pgibbs@cooley.com +1 650 843 5535
Nancy Wojtas Palo Alto	nwojtas@cooley.com +1 650 843 5819

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.